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No. 442

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, His Wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, His Wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

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On Appeal from the Supreme Court of the State of Illinois.

JURISDICTIONAL STATEMENT.

This is an appeal from a final judgment of the Supreme Court of Illinois entered on May 23, 1962, affirming an opinion of the trial court, the Circuit Court of Champaign

County, Illinois. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of the State of Illinois is reported in 24 Ill. (2d) 520, 182 N. E. (2d) 169. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION.

This is an appeal from a final order of the Supreme Court of Illinois affirming the action of the trial court directing a verdict as to the amount of compensation in an eminent domain proceeding brought by the appellee pursuant to the Illinois Gas Storage Act, Ill. Rev. Stat. 1959, Chapter 104, § 104-112 and the Public Utilities Act, Chapter 111⅔, § 1 et seq., 50, 56. Direct appeal to the Supreme Court of Illinois is authorized by Ill. Rev. Stat. 1959, Chapter 47, paragraph 12.

Judgment was entered by the Illinois Supreme Court on March 23, 1962, and an order was entered denying the petition for rehearing on May 23, 1962. The notice of appeal was filed in the Illinois Supreme Court on July 23, 1962.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U. S. C., § 1257 (2).

Jurisdiction of this appeal is sustained as to the unconstitutionality in application of a statute by **Near v. State of Minnesota, ex rel. Olson**, 283 U. S. 697. Review of non-appealable issues involving denial of federal rights is

authorized on appeal by **Flournoy v. Wiener**, 321 U. S. 253, 263. **Chicago, B. & Q. R. R. Co. v. City of Chicago**, 166 U. S. 226, holds that this court has jurisdiction based upon the question of a taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

STATUTES INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in § 1 that "nor shall any State deprive any person of life, liberty, or property, without due process of law" and the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."

The Illinois Gas Storage Act, Ill. Rev. Stat. 1959, Chapter 104, § 104-112 is set forth in Appendix B.

QUESTIONS PRESENTED.

In a proceeding to condemn appellants' subsurface gas storage space, the Illinois court received evidence only as to the damage to the appellants' surface use of the land while rejecting appellants' offers to prove the value of the subsurface gas storage space condemned and the court directed a verdict awarding appellants compensation in the amount of the damage to the surface use of the land. The questions presented are:

(1) Whether the Illinois statute on Underground Gas Storage is unconstitutional as interpreted by the Illinois court;

(2) Whether appellants' property was taken without due process of law in violation of the Fourteenth Amendment;

(3) Whether appellants were denied "just compensation" in violation of the Fifth Amendment as made applicable to state action by the Fourteenth Amendment.

STATEMENT OF THE CASE.

The appellee secured an order from the Illinois Commerce Commission granting a certificate of public convenience and necessity for the test operation, pursuant to the Illinois Gas Storage Act, of an underground natural gas-storage reservoir which includes within its boundaries a 160 acre farm owned by the appellants. The dome-like structure covers approximately 23,000 acres and 4,390 are involved in the test operation.

The 160 acres owned by the appellants is operated as a grain and livestock farm and the appellee introduced evidence by three real estate brokers that the burden of the appellee's easement amounted to $4,000. The appellee stipulated that its activities would be confined to the subsurface strata of the St. Peter formation some 1600 feet below the surface of the ground. None of appellee's real estate brokers were acquainted with the subsurface strata and no evidence was offered by the appellee as to the value of the thing taken.

The appellants sought to prove the value of the easement rights which were the subject of the eminent domain proceeding and all evidence of value offered by appellants was excluded.

The trial court then directed the jury to return a verdict in the amount of $4,000 and this judgment was affirmed by the Supreme Court of Illinois.

How the Federal Question Is Presented.

Illinois law makes no provision for the filing of an answer by the defendants in an eminent domain proceeding. The case of **Chicago, B. & Q. R. R. Co. v. City of Chicago** (1897), 166 U.S. 226, accurately states the present Illinois law on pleading in an eminent domain case. However, the defendants did file a motion to strike or traverse wherein they alleged that the exercise of the power of eminent domain by the petitioner was in violation of the Fourteenth Amendment of the Constitution of the United States (Transcript p. 4, Abstract p. 42).

Under Illinois practice the grounds for the appeal are set forth in the appellants' brief, Ill. Rev. Stat. 1959, Chapter 110, § 101.39. The applicable statute reads in part:

> "II. The Points and Authorities shall consist of the propositions relied upon in support of the appeal with citation of authorities."

This is the only place where the grounds for appeal are listed. At page 14 of the points and authorities the appellant said:

> "The arbitrary action of the trial court . . . by impressing its theory as to just compensation on the respondents by its trial rulings, was in violation of due process. Amendment XIV of Constitution of the United States, § 1."

which portion of the brief the Illinois Supreme Court was asked to certify as part of the record (Transcript p. 32) and the request was denied (Transcript p. 37).

This point was also emphasized in the petition for rehearing (Transcript p. 24—Petition for Rehearing p. 9):

> "In regard to the actions of the trial court which this Court found did not violate the state and federal

guarantees of due process, it is suggested to the Court that it has overlooked the fundamental concepts of due process as earlier expressed by this Court . . ."

The Illinois court in its opinion stated for the first time the Illinois law to be that the issuance of a certificate of use to the condemnor would preclude the landowner from valuation based on a similar use where there was no likelihood that a certificate would be issued to him. The first opportunity appellants had to raise the question of unconstitutional interpretation was in the petition for rehearing where the appellants said (Transcript p. 24—Petition for Rehearing p. 4):

"If this were the law, then the issuance of the certificate would constitute the taking of property which not only would violate the due process clauses of the State and Federal Constitutions but would also violate the constitutional guaranty of the right to a jury trial in eminent domain cases."

The Illinois Supreme Court in its *opinion at page 530* made reference to the due process question saying:

"As to the constitutional point of denial of due process, however, we have held that neither an abuse of discretion nor an erroneous rule of law as to damages or the refusal to admit evidence or grant continuances will support a reversal for violation of due process."

THE QUESTIONS ARE SUBSTANTIAL.

In this one gas storage project, 23,000 acres of Champaign County land are involved. The Eleventh Annual Report of Statistics, Committee on Underground Storage, American Gas Association, reported 229 underground stor-

age pools in the United States in 1961 located in 21 states with an estimated total reservoir capacity of 3,121 billion cubic feet. The number of such pools has increased from 142 in 1951 to 229 in 1961 or almost nine a year. This court should hear this case because although many landowners are in the same position as the appellants, the economics of litigation are such that it is unlikely they will be in a position to state their views to this court. The testimony offered of compensation due the landowners varied from $25 per acre to $1,270 per acre. Statutes similar to the Illinois Gas Storage Act have been passed in many states and the question of the right of the landowner to compensation for the thing taken is of nationwide interest.

1. This court in passing on the constitutionality of a statute regards substance rather than form and the Gas Storage Act must be tested by its operation and effect. **Near v. State of Minnesota ex rel. Olson,** 283 U. S. 697. In operation this statute confers the privilege of *underground* gas storage on the appellee without making any provision for compensation to the appellants. The statute therefore is in direct violation of the Fourteenth Amendment of the Federal Constitution in taking property not only without compensation but without the opportunity of a hearing on the question of compensation. This objection could not be noted in the lower court because until the Illinois Supreme Court spoke on this occasion, it had been the law that damages for the taking of property by condemnation were litigated in the eminent domain proceeding.

The appellants in this proceeding sought to introduce evidence of the value of the gas storage strata acquired by the appellee by condemnation and the court held that whatever may have been the rights of the appellants in this strata, they were effectively removed when a certifi-

cate to use the strata for gas storage was issued to the appellee by the Commission. The Illinois Gas Storage Act (Appendix B) providing for the issuance of a certificate makes no provision for compensation to the landowner when the certificate issues, and, there was no intimation in prior Illinois decisions that the issuance of a certificate foreclosed the landowner from valuing the property for the purpose taken. In fact, the implication in the reported cases is to the contrary. **City of Chicago v. Sexton** (1951), 408 Ill. 351, 357, 97 N. E. (2d) 287; **The Decatur Park Dist. v. Becker et al.** (1938), 368 Ill. 442, 447, 14 N. E. (2d) 490; **Mississippi and Rum River Boom Co. v. Patterson**, 98 U. S. 403.

This error was pointed out to the court in the petition for rehearing (Transcript p. 24—Petition for Rehearing p. 3):

> "The Court predicates its approval of the trial court's refusal to allow the introduction of evidence by the defendants of the value of the gas storage easement upon the impracticality, if not impossibility, of the regulatory body granting more than one certificate to operate a gas storage field in the same location. The case cited by the Court in support of this position is **United States v. Virginia Electric and Power Co.**, 365 U. S. 624, which in fact holds at page 635 (Reply Brief 7) that the impossibility of use by the condemnee of the property for the condemnation purpose by reason of the appropriation of that right by the condemnor shall be ignored in awarding compensation. . . . If we looked upon the granting of a certificate as the act which would preclude the admission of testimony based upon a similar use as that contemplated by the petition, then we would become involved in a race to a certificate. The issuance of a certificate is merely an expression that the public in-

terest will be served by the acquisition of the facility; it is not a weapon defeating valuation by the landowner based on the use contemplated by the certificate holder. If this were the law, then the issuance of the certificate would constitute the taking of property which not only would violate the due process clauses of the State and Federal Constitutions but would also violate the constitutional guaranty of the right to a jury trial in eminent domain cases (Reply Brief 3)."

The language of Justice Holmes in **Pennsylvania Coal Co. v. Mahon,** 260 U. S. 393, 415, 416, in analyzing an act of Pennsylvania taking away certain rights in the removal of subterranean coal is appropriate:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Railway Co., 208 U. S. 598, 605. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

To allow the Illinois court's view to prevail is to authorize the taking of property with only one use without compensation on a two-step basis. First the Commission will grant a certificate of convenience based on the public need for the particular use and then the court will deny valuation based on the only use because the landowner can not get a certificate. To reach this decision the Illinois court held as a matter of law that it would be necessary to exercise the power of eminent domain although all evidence introduced was to the contrary and the

court in its opinion noted that all land necessary for the project had been acquired by voluntary grant except the 160 acres owned by appellants. The court also held as a matter of law that no other person or corporation could secure an underground gas storage certificate since one had already issued. For the Illinois court to so hold is an interpretation of the Gas Storage Act which is contrary to the Constitution of the United States and an interpretation prohibited by **Pennsylvania Coal Co. v. Mahon et al.**, supra.

To paraphrase from **United States v. Virginia Electric Co.**, 365 U. S. 624, 636—It would be manifestly unjust to permit a public authority to depreciate property values by denying their use for the only available purpose and then to take advantage of this depression in the price it must pay for the property.

2. The due process clause of the Fourteenth Amendment applies to the states the requirement of the Fifth Amendment that "just compensation shall be paid for private property taken for public use." **Chicago, B. & Q. R. R. Co. v. City of Chicago**, 166 U. S. 226, 241.

The Illinois court admitted opinion evidence offered by the appellee of men who did not know the nature or value of the thing taken. It denied opinion evidence offered by the appellants of witnesses who devoted their lives to reservoir studies and who were qualified petroleum engineers. It also denied opinion evidence offered by the appellants of witnesses possessed of similar qualifications as the witnesses of appellee.

The result of exclusion of appellants' evidence on value is to permit private property to be taken under the direction of the State for public use without compensation to the landowner. **Chicago, B. & Q. R. R. Co. v. City of**

Chicago, supra. Compensation for the damage due to the loss in value of the surface is not compensation, just or otherwise, for the underground gas storage area taken.

The eminent domain statute of Illinois, Ill. Rev. Stat. 1959, Chapter 47, § 1, provides for the right to jury trial which right was asserted by the appellants and recognized pro forma by the trial court. The trial court by its rulings on evidence removed the fact finding function of the jury and then directed a verdict based on the only evidence admitted. The consequence is the State Legislature finds a need, the State Commission issues a certificate and a State Judge directs the amount to be paid.

3. The only other case dealing with this precise question of valuation is **United Fuel Gas Co. v. Allen** (1953), 137 W. Va. 897, 75 S. E. (2d) 88.

In West Virginia the court required evidence not only of the depreciation in value of the surface (the thing not taken) but also evidence of the value of the subsurface strata (the thing taken). The Illinois court specifically denied the admission of any evidence on the value of the subsurface strata. This conflict between the states should be resolved by this court.

CONCLUSION.

The appellants respectfully pray that the Supreme Court of the United States take jurisdiction of this appeal on the record in this case and that appellants be permitted to file briefs upon the merits in accordance with the Rules of this Court and be permitted to make oral argument thereof and that this Court declare the Illinois Gas Storage Act to be repugnant to the Federal Constitution, or order that this case be retried with the direction that evidence

be received as to the value of the property taken in fixing the compensation due the appellants.

Respectfully submitted,

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APPENDIX A.

Opinion Below.

(No. 36841.—Judgment Affirmed.)

Peoples Gas Light and Coke Company, Appellee, vs. Roscoe C. Buckles et al., Appellants.

Mr. Justice Solfisburg delivered the opinion of the court:

This matter involves a suit by the plaintiff gas corporation to condemn a subsurface geological strata under the land owned by the defendants for the purpose of storing gas underground. The condemnation suit did not seek the fee-simple title to the property but only the right to inject and withdraw gas from the St. Peter geological formation lying under the 160 acres of the defendants' land. The trial court directed a verdict awarding the defendants the sum of $4000 as just compensation for the taking of this underground strata. From this judgment defendants appeal directly to this court. Ill. Rev. Stat. 1959, chap. 47, par. 12.

It appears from the record that on March 21, 1960, the plaintiff filed a petition with the Illinois Commerce Commission for an order granting the plaintiff a certificate of public convenience and necessity for the testing, development, operation and maintenance of an underground gas-storage reservoir near the village of Mahomet, pursuant to the Illinois Public Utilities Act (Ill. Rev. Stat. 1959, chap. 111⅔, pars. 50, 56) and the Gas Storage Act (Ill. Rev. Stat. 1959, chap. 104, pars. 104, 105). The initial hearing before the Commerce Commission was set for April 21, 1960, notice was sent by registered mail to the record owner of each privately owned tract of land in the storage area against which eminent domain was to be exercised, and notice was given by publication in a newspaper of general circulation, more than 21 days prior to the

April 21, 1960, hearing. Pursuant to such notices, hearings were held before the Commerce Commission and on July 29, 1960, an order was entered by the Commission finding that there was reasonable expectation that the St. Peter geological formation in the vicinity of the village of Mahomet had a dome type of structure at approximately 1,650 feet below the surface, which might be utilized for the injection, storage and withdrawal of large quantities of gas. The dome-like structure covered approximately 23,000 acres with the primary area of somewhat less than 5000 acres at the crest of the structure which was to be the area for the initial development as a pilot or test operation. The order of the Commission made findings as to the nature of the geological structure; the absence of coal, gas, oil or mineral deposits in any commercial quantities; that notices had been sent to all land owners whose lands were to be subjected to condemnation; that the use of the gas-storage reservoir will not injure any water resources and will be confined to a geological stratum lying more than 500 feet below the surface of the soil; that the natural gas which is proposed to be stored would be used for ultimate distribution to the public in the city of Chicago and that the public convenience and necessity of a substantial portion of the gas-consuming public in the State of Illinois will be served by such gas-storage project. The order of Commission grants to the plaintiff under section 55 of the Public Utilities Act a certificate of public convenience and necessity to test, develop, construct, operate and maintain a gas-storage project and approves, under and pursuant to the provisions of the Natural Gas Storage Act, the development, construction, operation and maintenance of the underground natural gas-storage reservoir on a pilot operation. The order provides certain restrictive conditions protecting the rights of the owners of lands within the boundaries of the storage area and the public resources of the State, and for the carrying of public liability insurance.

No appeal was taken from the order of the Commission and thereafter on October 18, 1960, the plaintiff filed the present action in the circuit court of Champaign County. The complaint alleged that plaintiff was a public utility and had obtained an order from the Commerce Commission authorizing an under ground storage project in the vicinity of the village of Mahomet in Champaign County involving some 4,390 acres and that the plaintiff had acquired, by voluntary grant, the necessary rights to enable it to undertake the underground storage of gas from the owners of the land lying within the test storage area, except as to the 160 acres belonging to the defendants and prayed that the court ascertain and assess the compensation to be paid to the defendants and that plaintiff have the right, privilege and easement to develop and conduct the gas-storage operation under such land.

Following the issuance of summons against the defendants and the disposition of certain motions, pretrial discovery and preliminary matters, the case came on for trial and the plaintiff introduced evidence that the defendants operated the 160 acres as a farm for the raising of grain and livestock, that it was improved with the usual farm buildings, that it was located in a rural farming area and that no oil or gas had ever been produced in the area.

The plaintiff also presented the evidence of three expert real-estate appraisal witnesses who each testified as to the value of the farm before taking and the value after taking, showing that there was a loss in value of $4000. By stipulation plaintiff agreed that its activities would be confined to the subsurface strata of the St. Peter formation and would not involve any part of the surface of defendants' land.

The defendants attempted to introduce evidence that the highest and best use of the property was for the purpose of underground storage of gas and proposed through

expert witnesses to show the value or worth of the underground storage easement was approximately $300,000, and that the taking of the easement diminished the value of the defendants' land in that amount. The defendants' evidence to this effect was rejected by the trial court after an extensive series of offers of proof and the trial court directed a verdict, since the only competent evidence which had been allowed to be introduced showed damages to the defendants by reason of the subsurface easement of $25 per acre. Judgment was accordingly entered on the verdict for $4000.

The defendants, appellants in this court, raise numerous grounds for reversing the judgment of the trial court. Basically, these fall into four principal categories. First, the matter of "jurisdictional proof" (as defendants characterize it) as a prerequisite for the taking of defendants' land. This involves the validity of the order of the Commerce Commission and an asserted lack of certain other "jurisdictional requirements." Second, the constitutionality of the Gas Storage Act of 1951. (Ill. Rev. Stat. 1959, chap. 104, pars. 104 et seq.) Third, errors of the trial court relating to rulings on continuances, discovery and the pleadings which defendants contend denied them due process of law. Fourth, the exclusion of all evidence of value offered by the defendants with the withdrawal of the case from the jury and the direction of a verdict.

Concerning defendants' objections to the judgment of the lower court because of the lack of so-called "jurisdictional proof," their first contention is that the condemnation petition does not refer expressly to the statute which authorizes plaintiff to exercise eminent domain. There is no merit to this contention. The complaint states that the right to enter upon and take or damage private property is conferred by the Public Utilities Act and the Gas Storage Act when ordered or authorized by an order of the

Commerce Commission. Attached to the complaint is the order of the Commerce Commission which specifies not only the statutes but even the particuar sections of the statutes under which the plaintiff proceeded. In determining whether a petition for condemnation sufficiently alleges the statutory requirements for condemning property, the Commission's order attached to the petition as an exhibit must be considered in adjudging the sufficiency of the petition. (**City of Chicago v. Central National Bank**, 5 Ill. 2d 164, 173.) Nor is there merit to the defendants' contention that the project authorized by the Commerce Commission is only a pilot or experimental phase. **Wilcox v. Commerce Com.**, 23 Ill. 2d 432.

We likewise find no substance to the position of the defendants pertaining to the plaintiff's failure to negotiate in good faith. We are of the opinion that an adequate attempt to acquire the property right by negotiation was made by plaintiff. A final letter offering defendants $45 per acre for storage rights was sent to the defendants and no response thereto was received. While such an attempt is sufficient to show adequate negotiation (**Public Service Co. of Northern Illinois v. Recktenwald**, 290 Ill. 314, 317; **County Board of School Trustees v. Batchelder**, 7 Ill. 2d 178, 182), plaintiff's land agent also personally contacted the defendants. It is true that the instrument which the plaintiff first sought the defendants to execute was broader than the ultimate right condemned, in that it involved possible damage to, and entry upon the surface of defendants' land. Nevertheless, on this record, we think plaintiff has shown a good faith attempt to negotiate. The wide spread between the offering price of the plaintiff and the demand of the defendants, based on their differing theories of value for the storage rights, shows that no practical solution could have been reached through further negotiation.

Next defendants urge that the enabling order of the Commerce Commission is void because it is not supported

by the requisite findings. However, orders of the Commerce Commission which are within its statutory authority are not void but voidable only (**People ex rel. Illinois Highway Transportation Co. v. Biggs**, 402 Ill. 401, 409; **Chicago, Burlington and Quincy Railroad Co. v. Commerce Commission ex rel. Brotherhood of R. R. Trainmen**, 364 Ill. 213, 222) and such orders are not subject to collateral attack. (**Illini Coach Co. v. Commerce Com.**, 408 Ill. 104, 110; **Chicago North Shore and Milwaukee Railroad Co. v. City of Chicago**, 331 Ill. 360, 375; **Valier Coal Co. v. Department of Revenue**, 11 Ill. 2d 402, 409.) The defendants in this case were notified of the Commerce Commission proceedings but did not take part therein nor contest the order of the Commission by direct appeal. They cannot now collaterally attack the order. Besides, we have recently had occasion to examine, on a direct appeal, an order of the Commerce Commission authorizing an underground storage project as a prerequisite for exercising condemnation. (**Wilcox v. Commerce Com.**, 23 Ill. 2d 432.) The findings in the instant order of the Commission are in substantial accord with those which we approved in the **Wilcox** case. The stipulations which plaintiff filed do not alter the order of the Commission nor do they demonstrate any lack of findings. Such special conditions could have been included in the Commission's order had defendants participated in the proceedings before the Commission.

Neither do we find the Gas Storage Act of 1951 unconstitutional. It is not special nor local legislation. (**People ex rel. Deneen v. People's Gas Light and Coke Co.**, 205 Ill. 482, 494.) The right of eminent domain is part of the sovereignty of the State and may be conferred by the legislature upon particular kinds of grantees in the public interest, while withholding it from other types of persons or corporations. (Nichols, Eminent Domain, 3d ed., sec. 4.15; 17 I. L. P. 181, 195, Eminent Domain, secs. 5, 14; **Western Union Telegraph Co. v. Louisville & Nashville Railroad**

Co., 258 U. S. 13, 21, 66 L. ed. 437.) This court held many years ago in **Public Service Co. of Northern Illinois v. Recktenwald**, 290 Ill. 314 at page 319: "It cannot be doubted that power may be conferred upon a corporation organized under authority of the General Assembly to serve the public by supplying the people with gas, electricity, heat and water, which can best be produced and distributed by such a corporation acting under State control, to take private property for the public uses of such corporation by the power of eminent domain."

Nor is the Gas Storage Act an amendment by reference to the Public Utilities Act in violation of section 13 of article IV of the constitution. A careful examination of its provisions clearly shows that it is a complete and independent legislative enactment. Its application is limited to the acquisition by eminent domain of property rights for underground storage of gas (**Wilcox v. Commerce Com.**, 23 Ill. 2d 432), and such storage projects are for a public purpose.

Whether underground storage rights could also be acquired through eminent domain by virtue of section 59 of the Public Utilities Act, where the Commission has ordered or authorized improvements under section 50 of that act, as contended by plaintiffs, we need not specifically decide.

The next category of defendants' objections deals with the denial of due process in violation of constitutional rights because of the rulings of the trial court upon pretrial matters. While defendants list some 17 supposed "arbitrary actions" by the trial court which "constitute the denial of due process" they fail, in most cases, to point out wherein the ruling was erroneous other than being adverse to them. Rulings on continuances and most of the matters contained in defendants' "specifications" were discretionary with the trial court and no abuse of discretion is shown. Furthermore, the request of the defendants and

the rulings of the trial court in many of the complained-of instances relate to the theory of damages sought by the defendants and which we discuss later. As to the constitutional point of denial of due process, however, we have held that neither an abuse of discretion nor an erroneous rule of law as to damages or the refusal to admit evidence or grant continuance will support a reversal for violation of due process. (**Chicago Land Clearance Com. v. Darrow**, 12 Ill. 2d 365, 369; **Fairbank v. Stratton**, 14 Ill. 2d 307, 318.) Moreover, procedural due process is not a guarantee against erroneous or unjust decisions nor protection against the incorrect construction of statutes or rules of law. **Genslinger v. New Illinois Athletic Club**, 332 Ill. 316, 319; **Standard Motors Securities Corp. v. Yates Co.**, 337 Ill. 250, 252; **Illini Coach Co. v. Commerce Com.**, 408 Ill. 104, 111.

We next turn to defendants' primary argument and the basic issue in this proceeding, namely, the proper measure of damages to be used in determining the compensation payable to the defendants for impregnating with gas a subsurface strata lying under their land. The decision on this issue will determine the correctness of the trial court's rulings on the admissibility and refusal of evidence and whether or not the defendants, by the directed verdict, were denied their right of trial by jury.

The measure of damages in a condemnation proceeding is "just compensation" and this is generally determined by the fair market value of the property taken. (17 I. L. P. 223, Eminent Domain, sec. 61; **Central Illinois Public Service Co. v. Lee**, 409 Ill. 19, 26; **Chicago Land Clearance Com. v. Darrow**, 12 Ill. 2d 365, 372.) Market value is to be measured in view of any and all uses to which the property may be applied or adapted (**Crystal Lake Park Dist. v. Consumers Co.**, 313 Ill. 395, 402), or as oftentimes said "for its highest and best use upon the date that the condemnation petition is filed." (**City of Chicago v. Eq-**

uitable Life Assurance Society, 8 Ill. 2d 341, 345; **City of Chicago v. Giedraitis**, 14 Ill. 2d 45, 49.) However, such value cannot be based upon speculation and conjecture, such as an anticipated profit or possible income from the property. (**City of Chicago v. Giedraitis**, 14 Ill. 2d 45, 51; **Chicago Land Clearance Com. v. Darrow**, 12 Ill. 2d 365, 373; **City of Chicago v. Central National Bank**, 5 Ill. 2d 164, 175). And although the question of market value may be one of fact to be proved as any other fact (**Trunkline Gas Co. v. O'Bryan**, 21 Ill. 2d 95, 98), yet, what constitutes "market value" is a question of law and not of fact. **City of Chicago v. Farwell**, 286 Ill. 415, 419; **Crystal Lake Park Dist. v. Consumers Co.**, 313 Ill. 395, 402.

As we stated in **Housing Authority of East St. Louis v. Kosydor**, 17 Ill. 2d 602 at 605-6. "Definitions of 'just compensation' have ranged from 'the amount of money necessary to put him in as good condition financially as he was with the ownership of the property' (**City of Chicago v. Koff**, 341 Ill. 520, 527-28) to 'a sum of money that is the equivalent of the value of the property.' (**City of Chicago v. Cunnea**, 329 Ill. 288, 295.) But despite differences in definition, the applied measure of just compensation has been constant. The value to the owner of the property taken or damaged for his particular purposes, or its value to the condemnor for some special use, have been rejected in favor of the 'market value' of the property at the highest and best use to which it is adapted. (**City of Chicago v. Harrison-Halsted Building Corp.**, 11 Ill. 2d 431; see Symposium, Methods of Establishing 'Just Compensation' in Eminent Domain Proceedings in Illinois, Ill. Law Forum 1957, pp. 289-308.) This objective standard has been adopted in most jurisdictions. (McCormick on Damages, sec. 129.) Generally, exceptions occur only when property has special capabilities which make it unmarketable at its true value due to unique improvements, such as a church, a school or a railroad ter-

minal. 4 Nichols, Eminent Domain 133, sec. 12.32; **City of Chicago v. Farwell**, 286 Ill. 415; **City of Chicago v. Harrison-Halsted Building Corp.**, 11 Ill. 2d 431."

While these general rules are applicable to the present case, there are no decisions in Illinois, and, so far as we have been able to determine, none in other jurisdictions, involving the condemnation of an underground gas-storage reservoir. Consequently, the measure of damages applicable to the taking of a subsurface geological formation is one of first impression. Moreover, gas-storage fields have been the subject of experimentations for several years and some have proven successful while others have not. There is no certainty that the Mahomet field will be successful. The order of the Commerce Commission merely finds that the St. Peter formation may be suitable and that a pilot operation may "prove the soundness of the Galena-Plattsville caprock and to provide performance data on the St. Peter storage formation."

To understand the problem we must initially determine the nature of the taking. Plaintiff's petition sought, and the judgment of the court gave the plaintiff the right, privilege and easement to introduce gas into the St. Peter geological strata and to store gas in such formation with the right to remove such gas with any water vapors absorbed. No taking of the fee or damages to the surface of the land is involved. Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon the diminution of the fair cash market value of the property burdened by the easement. **North Shore Sanitary Dist. v. Schulik**, 12 Ill. 2d 309, 312; **Central Illinois Public Service Co. v. Lee**, 409 Ill. 19, 26.

We know of no factors or considerations involved in the condemnation of an easement for the underground storage of gas which requires it to have a different meas-

ure of damages than the customary measure of damages for easement acquisition. It is difficult for us to see how a commercially valueless salt-water-filled sandstone formation 1600 feet below the surface and which is unusable by the defendants, can take on any added value by virtue of a possible special use unavailable to them. However, if defendants' theory of damages is applicable, it should apply whether plaintiffs were seeking to condemn the whole (fee simple) of plaintiff's property or just the easement, since the defendants' theory is that the highest and best use of the property is specifically as a gas storage reservoir.

The evidence which defendants sought to introduce and the offers of proof made by defendants were based on the valuation of a successfully operating gas-storage field. Defendants offered the testimony of petroleum engineers who had prepared figures of the possible amount of gas which could be stored in the Mahomet field, assuming that it would be as capable as anticipated, and which showed that a reasonable development of the field would produce a future net revenue of $238,777,500 which was then discounted to obtain a present-day worth of $59,453,228 with the proportionate share of defendants' farm evaluated at $413,616. Other witnesses offered by defendants were prepared to testify that the highest and best use of defendants' land was for underground storage of natural gas and that the land for that purpose was worth $250,000 to $300,000 and, after the easement taking, it would be worth from $50,000 to $100,000, so that the damage to the defendants' land was in the neighborhood of $200,000. The lower court rejected these offers of proof. The plaintiff introduced evidence of value by customary methods. As an adverse witness, George Buckles testified that the 160-acre farm was used in a grain and livestock operation, was improved with usual farm buildings and that there had never been any oil or gas produced and

that he knows of no oil or gas under the land. Plaintiff also presented the evidence of three expert real-estate appraisal witnesses who testified as to the value of the farm before the taking of the easement and the value after the easement; with a determination of $4000 as being the difference or the burden of the plaintiff's easement. Two of the real-estate witnesses testified as to the sales of the fee of other tracts in the area during 1959, 1960, and January of 1961, at prices ranging from $500 to $600 per acre, and some of these sales were after the seller became aware of the gas-storage possibilities. The defendants' land was valued at $500 per acre.

While, as we have already noted, there are no specific decisions dealing with the condemnation of underground storage rights, there are some analogous situations in the water reservoir and hydro-electric power project cases. In **United States ex rel. TVA v. Powelson,** 319 U. S. 266, 87 L. ed. 1390, the Government condemned the respondent's land which was on a non-navigable stream. The respondent had, for a period of almost 30 years, been acquiring lands for constructing an integrated 4-dam hydro-electric project on the Hiwassee and Nottely Rivers which were tributaries to the Tennessee River. It was the respondent's theory that the value of his lands condemned by the Government for its Tennessee Valley project included its potential as a hydro-electric project. They sought to establish a value of $7,500,000 upon the assumption that the estimated cost of the 4-dam project would be $30,000,000 with an annual output of 512,500,000 kilowatt hours of energy at a production cost of 3.75 mills per kilowatt hour and a selling price of 6.34 mills, which, on an assumed net return, was capitalized so that the allocated part of the project to the lands in question was $7,500,000. (A theory similar to the defendants' offer in this case.) Not only did respondent in that case have a large part of the land already acquired but also had

the power of eminent domain, yet the court held that the value of the potential hydro-electric reservoir could not be considered. At page 285, the court held: "The result is that respondent's privilege to use the power of eminent domain may not be considered in determining whether there is a reasonable probability of the lands in question being combined with other tracts into a power project in the reasonably near future. If the power of eminent domain be left out of account, the chances of making the combination appear to be too remote and slim to have any legitimate effect upon the valuation.' **McGovern v. New York**, supra (229 U. S. 372, 57 L. ed. 1232, 33 S. Ct. 876, 46 L. R. A. (N. S.) 391. Respondent therefore has not established the basis for proof of the water power value which was asserted. * * * Respondent is, of course, entitled to the market value of the property fairly determined. And that value should be found in accordance with the established rules." In reaching this conclusion, the court said, pages 281-2: "It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken [Citations], not all losses suffered by the owner are compensable under the Fifth Amendment. In the absence of a statutory mandate * * * the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, Valuation Under Eminent Domain 1936, § 71, § 73. On the one hand are such cases as **Monongahela Nav. Co. v. United States**, supra, where it was held that the United States had appropriated a going enterprise to its own ends and must make compensation accordingly. But it is well settled in this Court that, 'Frustration and appropriation are essentially different things.' **Omnia Commercial Co. v. United states**, supra (261 U. S. 513) * * *."

We have also held that frustration of an anticipated return need not constitute a compensatory element in a

condemnation case. **Housing Authority of East St. Louis v. Kosydor**, 17 Ill. 2d 602, 608.

In **McGovern v. New York**, 229 U. S. 363, 57 L. ed. 1228, the city of New York sought to condemn land for use as a reservoir to obtain an additional supply of water. The land belonging to McGovern was among many parcels taken and the question arose on the refusal to admit evidence as to the exceptional value of the land for a reservoir site. The offer was made "to prove the fair and reasonable market value of this piece of property taking into consideration that element of value which gives it an enhanced value because it is part of a natural reservoir site." The New York courts had sustained the refusal of this offer of proof and in an opinion by Justice Holmes that action was affirmed. At page 372 it was stated: "The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See **Chicago, B. & Q. R. Co. v. Chicago**, 166 U. S. 226, 249 * * *."

We recognize that there may be special cases where the property is exceptionally adapted and available for a particular use which should be taken into consideration in fixing the value. See: **United States v. Chandler-Dunbar Water Power Co.**, 229 U. S. 53, 57 L. ed. 1063; **Mississippi and Rum River Boom Co. v. Patterson**, 98 U. S. 403, 25 L. ed. 206; **Illinois Light and Power Co. v. Bedard**, 343 Ill. 618; **Decatur Park District v. Becker**, 368 Ill. 442. However, in each of those cases the property in question did not need to be combined with numerous other tracts

in order to make it adaptable to the particular use which was determinative of the measure of damages.

Olson v. United States, 292 U. S. 246, 78 L. ed. 1236, involved damages to the lands bordering Lake of the Woods in Minnesota; and Olson, as the owner of some of that land, sought damages based on the value of the storage of water being available for generation of power. The lower court instructed the jury that they "will not make an award based on any claim for reservoir value." This action was approved by the Supreme Court, stating at pp. 256, 266, and 261: "The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect the market value. There must be a reasonable possibility that the owner could use his tract together with the other shorelands for reservoir purposes or that another could acquire all lands or easements necessary for that use. * * * When regard is had to the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with, it is clear that there is no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question. * * * On the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration."

In this case defendants' position relies on the "physical adaptability" of their land or what might be called the "strategic location" of their property. In **United States v. Chandler-Dunbar Water Power Co.**, 229 U. S. 53, the court specifically rejected any value due to the fortuitous

location of the property, stating at page 80: "It is not proper to attribute to it any part of the value which might result from a consideration of its value as a necessary part of a comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. * * * The 'strategic value' for which $15,000 has been allowed is altogether speculative."

Neither is there a "reasonable possibility" that the defendants could use their land together with the other lands necessary for a gas-storage field. Such a project not only depends on the putting together of some 5,000 acres, the minimum for the pilot operation of Mahomet, but also the obtaining of a certificate for the project from the Commerce Commission. The argument of defendants that other utilities had expressed interest in the availability of an underground storage area and, therefore, there is "marketability" to the under ground storage right in the defendants' 160 acres, is without merit. Before any utility could operate a gas-storage project an order granting a certificate of public convenience and necessity would be required even though no condemnation was involved. (**Wilcox v. Commerce Com.**, 23 Ill. 2d 432.) It also seems wholly impracticable, if not impossible, for a regulatory body to grant more than one certificate to operate a gas-storage field in the same location. We cannot conceive of how the Commission could grant the plaintiff a certificate to operate a storage field in the St. Peter strata under the defendants' land and also grant to another utility the same right. While usually a certificate of public convenience and necessity only permits a limited monopoly and is not exclusive, yet there are certain times and types of operation in the utility field where certificates may be mutually exclusive. (**Ashbacker Radio Corp. v. Federal Communications Com.**, 326 U. S. 327, 90 L. ed. 108.) Consequently, the grant of a certificate to one would exclude the possibility of a grant to another. Therefore,

the marketability of defendants' land for a gas-storage reservoir rests not only on a combination of other parcels but also on the grant of a certificate of public convenience and necessity, which makes any potential value from such use too remote and speculative for consideration in a condemnation proceeding. (See: **United States v. Virginia Electric & Power Co.**, 365 U. S. 624.) Adding to the speculative character of the defendants' theory of value is their own contention that the order of the Commission is only for an experimental operation to test the feasibility of making Mahomet an operational storage field. Defendants' testimony on value could only be based on a possibility and therefore was wholly conjectural.

We do not consider **City of Chicago v. Sexton**, 408 Ill. 351, to be applicable to the case at bar. There the condemnor sought to take the air rights over a piece of property in the heart of Chicago by constructing a viaduct over it. The evidence of value offered in the **Sexton** case was the standard type based upon sales of other property in the immediate locality and was not speculative or remote.

Furthermore, at the very heart of defendants' position is the fact that the St. Peter sandstone formation under the defendants' land achieves value solely because it is a part of the certified storage project of the plaintiff and, therefore, runs headlong into a well established rule in determining values, *i. e.*, that no consideration is to be given to the value to the condemnor for some special use. (**City of Chicago v. Harrison-Halsted Building Corp.**, 11 Ill. 2d 431, 440; **Housing Authority of East St. Louis v. Kosydor**, 17 Ill. 2d 602, 608.) "The question is what has the owner lost and not what has the taker gained." (**Boston Chamber of Commerce v. City of Boston**, 217 U. S. 189, 194, 54 L. ed. 725.) The taking of a salt-water-filled sandstone strata lying some 1600 feet below the

surface of the defendants' land would not appear to be of substantial monetary loss to the defendants. See also, **City of New York v. Sage**, 239 U. S. 57, 69 L. ed. 143, where it was held that the value to the condemnor of a piece of land combined with other parcels cannot be used as a guide to the compensation to which the owner is entitled. Neither can defendants' position be compared with the unitization of property for the recovery of oil. Defendants are not claiming a value for the loss of the salt water under their land. The plaintiff is not taking any oil or minerals from the defendants' property but is merely occupying a porous strata in the ground which is not adapted and available to any use by the defendants or any other reasonably potential purchaser. The only case which we have found pertaining to a subsurface taking is **United States v. Kansas City Life Insurance Co.**, 339 U. S. 799, 94 L. ed. 1277, and there the under-surface invasion destroyed the surface use of the land and was as destructive as if the land had been submerged. Here, the surface is not being disturbed or damaged. Again, the query must be what have the defendants lost and not what has the plaintiff gained.

We are, therefore, of the opinion that defendants' theory of value for their property was remote and speculative and the trial court was correct in rejecting the defendants' offer of proof. Where the theory of value of the property is dependent on too many contingencies and is too uncertain, the trial court does not err in excluding such evidence. **Chicago Land Clearance Com. v. Darrow**, 12 Ill. 2d 365, 373.

Since the offered testimony was properly excluded, the only competent evidence submitted to the jury was that the fair cash market value of the easement burden was $25 per acre or $4,000. Consequently, the court properly directed a verdict in that amount. (**City of Chicago in**

Trust for Schools v. Riley, 16 Ill. 2d 257, 264.) See also, **Trunkline Gas Co. v. O'Bryan**, 21 Ill. 2d 95, where we held that the lower court properly directed a verdict on the cross petition after properly excluding testimony by which the defendant sought to prove damages to lands lying outside the easement strip.

We, therefore, conclude that the judgment of the circuit court of Champaign County was correct and it is affirmed.

Judgment affirmed.

APPENDIX B.

Statutory Provisions.

Transportation, Distribution or Storage of Gas.

AN ACT concerning the use of eminent domain in connection with the transportation, distribution, or storage of gas, and granting rights for the storage of gas in property of the State of Illinois and political subdivisions, municipal corporations and quasi-municipal corporations therein. Filed June 21, 1951. L. 1951, p. 395.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

104. Acquisition by condemnation proceedings of private property by corporations distributing, transporting or storing gas.] § 1. Any corporation which is engaged in or desires to engage in, the distribution, transportation or storage of natural gas or manufactured gas, which gas, in whole or in part, is intended for ultimate distribution to the public in the State of Illinois, if the said business of such corporation is regulated or subject to regulation under either the laws of the State of Illinois or the laws of the United States, shall have the right to enter upon, take or damage private property or any interest therein, in the manner provided for by the law of eminent domain, necessary or convenient for its said operations, including the storage of gas, all of which operations are hereby recognized and declared to be affected with a public interest and all of the property used in which operations is hereby recognized and declared to be devoted to public use.

105. Order approving proposed storage project required Liability insurance.] § 2. Before the right of condemnation may be exercised for the acquisition of property, or any interest therein, for underground storage of gas, said corporation shall make application to the Illinois Commerce Commission (hereafter referred to in this Act as the Commission) for an order and must receive an order approving the proposed storage project. No such order shall be issued by the Commission unless it shall contain and be based on findings that the proposed storage will be confined to geological stratum or strata lying more than five hundred feet below the surface of the soil; that the proposed storage will not injure any water resources; that the proposed storage will involve no condemnation of any interest in any geological stratum or formation within the area of the proposed storage project containing oil, gas or coal within such area in commercial paying quantities, producible through primary production methods, either with or without pressure maintenance, or secondary recovery methods of any type; that the public convenience and necessity of a substantial portion of the gas consuming public in the state will be served by such acquisition; and unless said order contains conditions and restrictions which will reasonably protect:

(a) private property or any interest therein not appropriated;

(b) the rights of the owners of the lands lying within the boundaries of said proposed storage area or persons claiming under them, or of the owners of the minerals thereunder or those claiming under them to explore for, drill for, produce, develop, conduct secondary recovery operations (such as waterflood or gas injection operations) for the recovery of oil or gas on or under said lands, or to drill wells on said lands for the development and production of water or the disposal of salt water,

fresh water or waste matter, all from or into strata other than any stratum to be condemned for gas storage.

(*c*) any public resources of the state which may be affected by such use.

The Commission shall in such order require such corporation to carry public liability insurance in an amount determined by the Commission, with an insurer satisfactory to the Commission, or at the election of the corporation to deposit collateral approved by the Commission in an amount determined by the latter, to secure payment of any damage resulting from any occurrence arising out of or caused by operation or use of the gas storage reservoir. The Commission order shall require that such insurance be maintained for a term of ten years from the date of the beginning of operation or use of the project and that such corporation appear before it not less than 90 days prior to the expiration of such ten year term and show cause why such insurance should not be renewed for an additional term of ten years with a like obligation on the corporation as to further renewal at the end of such latter term. Such procedure shall apply thereafter for successive ten year terms so long as the Commission continues to require such insurance.

106. Notice of hearing on application.] § 3. Upon the filing of the application specified in Section 2[1] hereof, the Commission shall set a date for a hearing thereon, and said corporation shall thereupon cause notice of said hearing to be given by publishing notice thereof at least once each week for three successive weeks in some newspaper of general circulation in the county or counties wherein the gas is proposed to be stored, the first such publication to be at least 21 days prior to the date of the hearing. Any order approving the proposed storage project shall

[1] Section 105 of this chapter.

not be operative against any privately owned interest in any tract of land, unless notice of said hearing be sent at least 21 days prior thereto by registered mail to the record owner thereof to his last known address as disclosed by the records of the Tax Collector of the county wherein such land is located, proof of which shall be made by affidavit filed in the proceeding.

107. Hearing on application.] § 4. At the hearing on said application, the Commission shall receive and hear and make a record of such relevant evidence on the issues as may be offered by any person directly interested, and shall enter an order either granting or denying the relief sought, which order shall specify the Commission's findings and directions on the relevant issues and conditions listed in Section 2[1] hereof.

108. Action to test lawfulness of order—Appeal.] § 5. Any person directly affected by the order of the Commission shall have the right to bring a civil action to test the lawfulness and reasonableness of said order by filing a complaint in the Circuit Court of the county in which the proposed storage area or any part thereof, may lie, against the Commission or the members thereof as defendants, for review of such order. Such action shall be brought within thirty (30) days of the entry of the order by the Commission and in the event no such action is filed within said time, the order of the Commission shall be final. In such action the Court may stay the order of the Commission until the court shall enter its decree. In such action the burden of proof shall be upon the party complaining of such order and such order shall be deemed prima facie valid. Any person directly interested in the subject matter may, in the discretion of the court, be permitted to intervene in such action. Any party to such

[1] Section 105 of this chapter.

action may offer in evidence all or any part of the record of the hearing before the Commission, and any other relevant evidence. The practice, pleading and proceedings in such action, which shall be equitable in nature, shall conform to the rules prescribed by the Civil Practice Act[1] as far as the same may be applicable. The court shall have jurisdiction to enter a decree affirming or setting aside said order, or remanding the cause to the Commission with directions to modify such order so that it shall conform to the provisions of this Act.[2] Said action shall have precedence over other matters before the Court. Appeals may be taken by any party to such action in the same manner and to the same extent as in other civil actions.

109. Lands owned by State or political subdivisions, use of—Compensation.] § 6. Upon receiving an order approving such gas storage project, such corporation shall have the right to utilize for the storage project so approved any geological stratum or formation required thereby, lying more than five hundred feet below the surface (but not including the surface) of any real estate owned by the State of Illinois, or owned by any political subdivision, including, but not restricted to, any municipal corporation or quasi-municipal corporation, of the State of Illinois. Such corporation shall as a condition of such utilization of real estate owned by such a political subdivision pay thereto compensation in an amount ascertained in the manner provided by the law of eminent domain. Such corporation shall as a condition of such utilization of real estate owned by the State of Illinois pay to the State Treasurer a reasonable compensation therefor in such amount as may be determined by the Illinois Commerce Commission.

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[1] Chapter 110, § 1 et seq.

[2] Sections 104-112 of this chapter.

110. Rights granted are in addition to other rights—Effect of application.] § 7. The rights herein granted shall be in addition to any right now possessed by any public utility to condemn property for use in its operations. The filing and prosecution before the Illinois Commerce Commission of an application pursuant to the rights granted hereby shall not subject such corporation to any regulation by that Commission or by law not otherwise applicable, or excuse it from any applicable law or regulation.

111. Partial invalidity.] § 8. If any section, paragraph, sentence or phrase of this Act[1] shall be declared unconstitutional, or void for any reason by any court of final jurisdiction, such fact shall not in any manner invalidate or affect any other section, paragraph, sentence or phrase of this Act, but the same shall continue in full force and effect.

112. Act ineffective on and after July 1, 1976.] § 9. On and after July 1, 1976, the provisions of this bill shall be ineffective.

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[1] Sections 104-112 of this chapter.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, his wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, his wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation,
Appellee.

No. 442

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, his wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, his wife, *Appellants*, vs. THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation, *Appellee*.	No. 442

MOTION TO DISMISS

Now comes Appellee, The Peoples Gas Light and Coke Company, a corporation, and moves this Court, pursuant to its Rule 16(b), to dismiss the appeal herein on the grounds that:

1. The questions presented by Appellants' Jurisdictional Statement were not timely urged and argued in the court below; and

2. As disclosed by the Jurisdictional Statement, no substantial Federal question is presented for determination by this Court.

QUESTIONS PRESENTED

(1) Whether Appellants have properly preserved the Federal questions they seek to raise in this appeal.

(2) Whether the Federal questions which Appellants seek to raise are sufficiently substantial and sufficiently in doubt to merit the consideration of the United States Supreme Court.

STATEMENT OF THE CASE.

Appellee, The Peoples Gas Light and Coke Company, is an Illinois public utility engaged in the business of distributing and selling gas in the City of Chicago, Illinois. In connection with its gas distribution business, Appellee secured regulatory approval from the Illinois Commerce Commission for the development and operation of an underground gas storage reservoir in the vicinity of Mahomet, Illinois. The Mahomet storage dome, the St. Peter sandstone formation, underlies approximately 23,000 acres at a depth in excess of 1,600 feet, but it was contemplated that in the initial or pilot phase of the project testing and development would be limited to a primary storage area of some 4,390 acres.

Appellants are the owners of a 160-acre grain and livestock farm which lies within the boundaries of the primary storage area. Being unable to agree with Appellants as to the compensation properly payable for the acquisition of an underground gas storage easement, Appellee initiated proceedings in condemnation to secure from

Appellants an easement to store gas in the St. Peter sandstone formation. No rights were sought by Appellee with respect to the surface of the Appellants' farm, nor indeed with respect to any other portion of that farm than the St. Peter formation, a salt water-filled sandstone.

Appellants filed a motion to dismiss the condemnation proceeding, which was overruled by the trial court after the hearing of evidence and filing of briefs by the parties.

Upon the overruling of Appellants' motion to dismiss the condemnation proceeding, the cause was put down for trial before a jury on the sole issue of the compensation or damages properly payable to Appellants by Appellee upon the latter's acquisition of a storage easement on Appellants' property.

At this trial, Appellee presented evidence through three expert real estate appraisal witnesses that the fair cash market value of the 160-acre farm owned by Appellants, at its highest and best use for farming purposes, would be diminished in the amount of $4,000 by virtue of the imposition of Appellee's easement for the underground storage of natural gas.

Appellants attempted to introduce evidence that the highest and best use of their farm was for the purpose of the underground storage of natural gas, and derived a value of the property for this purpose in the order of almost $300,000, with a consequent diminution in value because of the taking of the storage easement. This conclusion was reached on the basis of a purported valuation of the storage easement itself, rather than upon a determination of the price which Appellants' farm would bring on the open market. Appellants' evidence to this effect was rejected by the trial court on the grounds that it was remote and speculative.

At the close of all the evidence proffered by both parties, Appellee's motion for a directed verdict was granted, as the only competent evidence before the court and jury showed the compensation properly payable to Appellants to be $4,000. Judgment was accordingly entered on the verdict. Appellants appealed the judgment directly to the Illinois Supreme Court which, in an opinion reported in 24 Ill. 2d 520, 182 N.E. 2d 169 (set out at Jurisdictional Statement, App. A) affirmed the judgment.

Appellants appeal the decision of the Supreme Court of Illinois affirming the judgment of the trial court, alleging jurisdiction in this Court under 28 U.S.C., Sec. 1257(2), on the grounds that the Illinois Underground Gas Storage Act (Ill. Rev. Stat. 1961, chap. 104, Sec. 104-112; set out at Jurisdictional Statement, App. B) is contrary to the Fourteenth Amendment to the Constitution of the United States.

Appellee contends, however, that the issues urged upon the United States Supreme Court in Appellants' Jurisdictional Statement were not raised before nor decided by the Illinois Supreme Court, nor necessary to its decision, and that they are not properly before this Court. Alternatively, Appellee contends that even if these questions are before this Court, their answer is so clear that the appeal should be dismissed for want of a substantial Federal question.

ARGUMENT.

I.

THE APPEAL SHOULD BE DISMISSED BECAUSE NONE OF THE SO-CALLED "FEDERAL QUESTIONS" URGED IN THE JURISDICTIONAL STATEMENT WERE PROPERLY RAISED IN THE STATE COURT FROM WHICH THIS APPEAL IS BROUGHT.

The case at bar comes to this Court after the resolution of a variety of issues by the courts below. The fairest summary of these issues, indicative of the context in which they were resolved by the Illinois Supreme Court is set forth in that Court's Opinion at p. 16 of the Jurisdictional Statement:

> "The defendants, appellants in this court, raise numerous grounds for reversing the judgment of the trial court. Basically, these fall into four principal categories. First, the matter of 'jurisdictional proof' (as defendants characterize it) as a prerequisite for the taking of defendants' land. This involves the validity of the order of the Commerce Commission and an asserted lack of certain other 'jurisdictional requirements.' Second, the constitutionality of the Gas Storage Act of 1951. (Ill. Rev. Stat. 1959, chap. 104, pars. 104 *et seq.*) Third, errors of the trial court relating to rulings on continuances, discovery and the pleadings which defendants contend denied them due process of law. Fourth, the exclusion of all evidence of value offered by the defendants with the withdrawal of the case from the jury and the direction of a verdict."

To invoke the jurisdiction of this Court, there must have been involved in the Illinois Supreme Court's ruling on

these issues a Federal question which was properly urged on that Court, and properly preserved on the appeal to this Court. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 317 (1937); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434-35 (1940).

Appellants' Jurisdictional Statement discloses that the *only* Federal question relied on is a denial of due process under the Fourteenth Amendment in the application of the Illinois Storage Act to Appellants because of the trial court's refusal to admit evidence offered by them as to the value of their farmland for underground gas storage purposes. The jurisdiction of this Court, then, depends upon finding from the present record that the contention that these exclusionary rulings was violative of due process to Appellants under the Fourteenth Amendment was properly raised and was in fact determined by the Illinois Supreme Court.

Appellants first seek to find an indication in the record that they urged, and that the Illinois Court decided adversely to them, that the rulings by the trial court on the evidentiary matters before it amounted to an unconstitutional denial of Federal due process by quoting, at p. 5 of the Jurisdictional Statement, one of the Points and Authorities upon which this case was presented to the Illinois Supreme Court. Appellants, however, neglect to include in their quotation of this Point material which is conclusively instructive on the *actual issue* that Appellants were arguing at that point in this proceeding:

> "The arbitrary action of the trial court *in its rulings on pre-trial questions including the use by Respondents of discovery procedures, in its rulings excusing important material witnesses from testifying, and in denying motions for the continuance supported by affidavit without regard to Supreme Court Rule 14,*

> *and* by impressing its theory as to just compensation on the respondents by its trial rulings, was in violation of due process." (Point IV, p. 14, Appellant's brief to the Illinois Supreme Court; material omitted in Appellants' quotation supplied and emphasized)

It is clear from the full quotation of the Appellant's phrasing of the issue that in the Illinois Supreme Court they were *not* arguing that an unconstitutional measure of damages was authorized or required by the Storage Act to be applied to them. Rather, Appellants' argument was that the pattern of the trial court's *entire conduct of the case*, as evidenced by its rulings on the various matters from start to finish, evinced such a disregard for their rights as to constitute bias and prejudice which amounted to a judicial denial of due process through the denial to Appellants of a fair and impartial trial.

Not only is it clear that this is the issue that was *raised* by Appellants, it is equally clear that this is the issue that was *decided* by the Illinois Supreme Court:

> "The next category of defendants' objections deals with the denial of due process in violation of constitutional rights because of the rulings of the trial court upon pre-trial matters. While defendants list some 17 supposed 'arbitrary actions' by the trial court which 'constitute the denial of due process' they fail, in most cases, to point out wherein the ruling was erroneous other than being adverse to them. Rulings on continuances and most of the matters contained in defendants' 'specifications' were discretionary with the trial court and no abuse of discretion is shown. Furthermore, the request of the defendants and the rulings of the trial court in many of the complained-of instances relate to the theory of damages sought by the defendants and which we discuss later. As to the constitutional point of denial of due process, however, we have held that neither an abuse of discretion nor an erroneous rule of law as to damages or the refusal

> to admit evidence or grant continuances will support a reversal for violation of due process. [Citing] Moreover, procedural due process is not a guarantee against erroneous or unjust decisions nor protection against the incorrect construction of statutes or rules of law. (Jurisdictional Statement, p. 19-20)

Obviously, the Illinois Court did not have before it the question of whether or not the Storage Act authorized an unconstitutional exclusion of evidence, but was considering only whether or not the trial judge's conduct had been so arbitrary and prejudicial as to amount to a denial of due process. An appeal to this Court under 28 U.S.C. 1257(2) is authorized only where the validity of a state *statute*, not the conduct of a trial by a state judge, has been "drawn in question." Simply stated, the fatal defect in Appellants' position is that *they failed to preserve the point which they argued, and failed to argue the point which they preserved.* Under these circumstances, neither point is properly before this court.

Appellants' only other assertion of a Federal question is found in their suggestion that they raised the issue that the evidentiary rulings of the trial court at the hearing on damages were unconstitutional in their Petition for Rehearing filed *after* the opinion of the Illinois Supreme Court. (Jurisdictional Statement 5, 6). Apparently, Appellants at this point awakened to the realization that although they had raised several constitutional arguments against the Storage Act (which they are now content to waive), *they had never urged or argued that the Storage Act authorized or contemplated an unconstitutional measure of damages*, since this case was tried on the understanding expressed by the Illinois Supreme Court that the measure of damages to be applied in the case was the normal and customary one in condemnation cases. As stated by the Illinois Supreme Court:

> "Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon the diminution of the fair cash market value of the property burdened by the easement. [Citations]" Jurisdictional Statement, p. 22.

From the outset of this case Appellants were well aware that the procedures covering the condemnations authorized by the Storage Act would be, as provided by Sec. 104 of the Storage Act (Jurisdictional Statement, p. 32), "in the manner provided for by the law of eminent domain." Illinois procedures in eminent domain are established by Ill. Rev. Stat. 1961, Chap. 47, Sec. 1, *et seq.*, the constitutionality of which has never been seriously questioned. Actually, if Appellants were to follow the logic of their argument in objecting to the rulings of the trial court, they should be attacking the constitutionality of the Illinois Eminent Domain Act. Significantly, they did not do this, and they are forced to argue that the objections which they made to the Storage Act included the issue which they now urge upon this Court, when in fact those objections did not. Though they purport to be attacking the constitutionality of the Storage Act, it is interesting that nowhere in Appellants' Jurisdictional Statement do they point out to this Court the provision or language of that Act which Appellants contend is unconstitutional.

In essence therefore, what Appellants now seek to do is convert an argument based upon evidentiary rulings allegedly erroneous under state law into an argument that the Storage Act imposes a new and unconstitutional measure of damages in condemnation cases brought pursuant to it. Jurisdictionally, their effort comes too late to afford them the remedy of review in this Court, as it is contrary to the long-established rule that a Federal question first raised in a petition for rehearing cannot serve as a basis of an ap-

peal to the United States Supreme Court. *Chicago, Ind. & Louisville Railway* v. *McGuire*, 196 U.S. 128 (1905); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932) (*certiorari* to Idaho Sup. Ct.).

In their Jurisdictional Statement, Appellants anticipate the rule that they cannot rely on Federal questions raised for the first time in a petition for rehearing to the state court by attempting to take advantage of the so-called "surprise" doctrine, that a Federal question is properly raised if made at the first opportunity, even though that opportunity be in a Petition for Rehearing.

Thus, they state that the Illinois Supreme Court "held that whatever may have been the rights of the appellants in this strata, they were effectively removed when a certificate to use the strata for gas storage was issued to the appellee by the Commission." (Jurisdictional Statement, p. 7-8), and that the "rule of law" so laid down came as a complete and unanticipated surprise to Appellants because "there was no intimation in prior Illinois decisions that the issuance of a certificate foreclosed the landowner from valuing the property for the purpose taken." (Jurisdictional Statement, p. 9).

To take advantage of the surprise rule, the Appellants *must in fact have been surprised;* that they were not is indicated by their argument at p. 3 of their Reply Brief submitted to the Illinois Supreme Court:

> "Petitioner says the Defendants do not have a certificate of public convenience and necessity, and, therefore, it is not possible for them to utilize this land for gas storage."

But though this point was raised by Appellants in their Reply Brief and precludes them from taking

advantage of the *surprise* rule, it does *not* afford them an opportunity to have that question considered by this Court, for at no point, *prior* to the Petition for Rehearing, did Appellants ever argue or urge that the application of such a rule would violate any provision of the *United States* Constitution.

It is well-established that a general reference to "due process" will be taken to have reference to the state constitution clause concerning that subject. *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933); *Bowe* v. *Scott*, 233 U.S. 658, 664-65 (1914).

Illinois, like most states, has a "due process" clause,* and under the rule of the foregoing cases, Appellants' averments, and their resolution by the Illinois Supreme Court must be taken to have had reference solely to arguments raised under the state constitution. The Federal issue was thus not properly raised, and the Illinois Supreme Court's decision, if any, on the state constitution presents no issues for determination by *this* Court.

But even assuming that the rule of law alleged by Appellants to have been laid down by the Illinois Supreme Court could be said to come as a *surprise* to them, it is clear *that in fact no such rule was enunciated by the Illinois Supreme Court.* The Illinois Supreme Court viewed the fact that a certificate of public convenience and necessity would be required by Illinois law prior to the operation of an underground gas storage project as simply another fact supporting the conclusion that it was extremely unlikely that a potential purchaser of Appellants' property would, in appraising its value, attach any significance to the fact that it was underlain by a salt water-

* (Art. II, Sec. 2, Ill. Constitution of 1870).

filled strata that might possibly be suitable for gas storage:

> "The marketability of defendants' land for a gas storage reservoir rests not only on a combination of other parcels but also on the grant of a certificate of public convenience and necessity, which makes any potential value from such use too remote and speculative for consideration in a condemnation proceeding." (at p. 29 of Jurisdictional Statement)

But even if the Illinois Supreme Court had ruled that the issuance of a certificate for a storage project deprived Appellants of the right to show that the property's value for storage purposes had been reflected in the cash market price which a purchaser would have been willing to pay for the property, it would avail Appellants nothing here: for the Supreme Court's affirmance of the trial court's decision rests on an adequate and independent state ground justifying the rejection of the evidence offered by Appellants in the trial court, which preclude Appellants from relying on a "Federal question" which was not necessary for the decision of the case. *Stembridge* v. *Georgia*, 343 U.S. 541, 547-48 (1952); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

The first such ground is the rule of law that value for a purpose requiring the combination of a great number of parcels of land cannot be reflected in the cash market value of a particular parcel, unless the possibility that such combination can be effected is not remote and speculative. (See cases discussed in the lower Court's opinion at pp. 24-28, Jurisdictional Statement, and relied on for the statement that "Neither is there a 'reasonable possibility' that the defendants could use their land together with the other lands necessary for a gas-storage field." (Jurisdictional Statement, p. 28). An additional independent state

ground supporting the Illinois Supreme Court's decision is its reliance on what it referred to as the "well established rule in determining values, *i.e.*, that no consideration is to be given to the value to the condemnor for some special use." (Jurisdictional Statement, p. 29)

The whole problem with Appellants' theory is that they are attempting to manufacture a constitutional issue out of a factual comment made by the Illinois Supreme Court in the course of holding "that defendants' theory of value for their property was remote and speculative and the trial court was correct in rejecting the defendants' offer of proof." (Jurisdictional Statement, p. 30)

II.

EVEN IF THE ISSUES RAISED BY APPELLANTS WERE PROPERLY BEFORE THIS COURT, THOSE ISSUES HAVE LONG SINCE BEEN RESOLVED AGAINST THEM AND PRESENT NO SUBSTANTIAL FEDERAL QUESTION FOR DECISION BY THIS COURT.

The nature of the issue involved in this case and the Illinois rule of law applied in its resolution are well stated in Justice Solfisburg's opinion:

> "To understand the problem we must initially determine the nature of the taking. Plaintiff's petition sought, and the judgment of the court gave the plaintiff the right, privilege and easement to introduce gas into the St. Peter geological strata and to store gas in such formation with the right to remove such gas with any water vapors absorbed. *No taking of the fee or damages to the surface of the land is involved.* Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon *the diminution of the fair*

> *cash market value of the property burdened by* the easement. [Citing]" (emphasis added; Jurisdictional Statement, p. 22).

The Illinois courts held that no evidence of value based on the adaptability of Appellants' land for gas storage would be allowed. This holding was based on a number of considerations, but mainly on the fact that Appellants own only 160 acres out of the many thousand necessary to the project. Just as the United States Supreme Court has held in a series of cases involving condemnation of reservoirs,* the Illinois Supreme Court held here that the likelihood of Appellants being able to join all the tracts necessary without the power of eminent domain was so slight as not to be considered. Accordingly, the Supreme Court of Illinois was simply affirming the trial court's finding that the fair cash market value of Appellants' property, as that value would be judged by a potential purchaser thereof, would not include any increment by reason of the potential use of a geological formation under the property for underground gas storage purposes.

The only argument that Appellants now make is that the compensation which they were given was inadequate. "Compensation for the damage due to the loss in value of the surface is not compensation, just or otherwise, for the underground gas storage area taken." (Jurisdictional Statement, p. 11). The Illinois Supreme Court, as shown above, specifically held that the compensation paid was not paid for damage to the surface, for no damage to the surface was expected. The award of compensation was for the difference between the market value of the whole

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* *McGovern v. New York*, 229 U.S. 363 (1913); *City of New York v. Sage*, 239 U.S. 57 (1915); *Olson v. United States*, 292 U.S. 246 (1934); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943).

fee simple and the market value of the fee burdened by the storage easement. Compensation was paid for exactly what was taken, under the rule long established by the Illinois Courts.

Mr. Justice Holmes, in *McGovern* v. *New York*, 229 U.S. 363 (1913), answered a contention identical to that made here. The defendant in a condemnation proceeding claimed that his property had been taken without due process of law. The statute in question provided that "just and equitable compensation . . . ought to be made." The trial court had refused to admit any evidence of the value of the land for reservoir purposes because so many parcels were involved that the possibility of consolidation was negligible. Justice Holmes observed that "If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court." (at 370). See also *Roberts* v. *New York*, 295 U.S. 264, 277 (1935).

The Appellants here relied on *Chicago, Burlington & Quincy* v. *Chicago*, 166 U.S. 226 (1897) but they have not shown that their case comes within the rules laid down there for review by the Supreme Court. In fact, the *Chicago, Burlington* case itself lays down standards for review of an issue such as that raised by Appellants that are pursuasive to the conclusion that this appeal presents no substantial Federal question. After a jury trial, a verdict awarding damages to the railroad in the amount of one dollar was entered, and the Illinois Supreme Court affirmed this award. The railroad appealed to the United States Supreme Court contending "That the judgment of the state court whereby a public street is opened across its land used for railroad purposes, and whereby compensa-

tion to the extent of one dollar only is awarded, deprives it of its property without due process of law contrary to the prohibitions of the Fourteenth Amendment;" at p. 232. After holding that the point had been properly preserved by the Appellant railroad the U. S. Supreme Court, through Mr. Justice Harlan, proceeded to consider the merits of the railroad company's contentions.

> "The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated." At p. 241.*

This Court appraised the railroad company's contentions in the light of the following standards:

> "In harmony with those views, we may say in the present case, that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also *Marchant* v. *Pennsylvania RR*, 153 U.S. 380." At p. 247.

This court affirmed.

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* Appellants' suggestion that their case derives some strength from the fact that they were denied a jury trial by the verdict which was directed against them (Jurisdictional Statement, p. 11) is also overthrown by the *Chicago, Burlington* case, as the Court at p. 244 notes that there is no right under the Federal Constitution to a jury trial in a condemnation case brought pursuant to state law. In any case, even where there *is* a right to jury trial, it is proper to direct a verdict where all of the evidence is in agreement, and there is no suggestion by Appellants that there was any evidence before the trial court contradictory of that introduced by Appellee.

Again, the *Chicago, Burlington* case is dispositive of another point urged by Appellants. The holding that evidence of the value of Appellants' farm for gas storage purposes was too remote and speculative to be considered, compares with the argument of the railroad that it was possible that at some time it might cease to use its property for a railroad right of way, and that it should therefore be permitted to prove its damages as if the street were being constructed across property available for sale in the general real estate market. In answer to this contention, Mr. Justice Harlan said, at pp. 249-250:

> . . . the jury could not properly have taken into consideration the possibility that at some future time the company would adopt that course, and thereby put itself in condition, if no street were opened across it, to sell its land for what it was worth as land, freed from any public easement. Such a possibility was too remote and contingent to have been taken into account. There was nothing in the evidence, introduced or offered and excluded, suggesting any probability that the company intended to use or would in the near future use the land within the crossing for any other purpose than as a right of way."

In the case at bar, there was no suggestion that the Buckles farm was to be used for anything but farming by its owners or, more important, by a potential purchaser of the property. Accordingly its value reflected only its highest and best use for farming purposes, and the trial court properly refused to attribute to the Appellants' property any "value" derived from a use to which no potential purchaser would put it.

This Court has often held that remote and speculative evidence of value may properly be excluded, and it does not sit to review state court determina-

tions of whether such evidence *was* speculative. As this Court said in *McCoy* v. *Union Elevated R.*, 247 U.S. 354, 363 (1918), "Our concern is not to ascertain whether the rule [of condemnation] adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundmental right."

CONCLUSION.

For the reasons stated, Appellee considers the appeal of this case improvidently filed and urges this Court to dismiss the appeal for failure to properly raise the Federal questions argued, or, alternatively, for want of a substantial Federal question.

Respectfully submitted,

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No. 442.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, His Wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, His Wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

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Appellee.

On Appeal from the Supreme Court of the State of Illinois.

PETITION FOR REHEARING.

This Court on an appeal from the Supreme Court of Illinois granted the motion to dismiss the Jurisdictional Statement and treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari was denied.

The opinion of the Supreme Court of the State of Illinois reported at 24 Ill. 2d 520 a copy of which is made a part of the Jurisdictional Statement as Appendix A, states the facts accurately and fully and the reasoning based on those facts is persuasive; however, the result of the decision may well be to take by judicial fiat the subsurface rights of landowners throughout the country.

This is a case of first impression and, while there is no other case exactly in point, this court in an opinion announced December 17, 1962, Schroeder v. City of New York, No. 75, October term, 1962 said "the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process,—the right to be heard." Just as the right to notice is a corollary of the right to be heard, so is the right to introduce evidence. It is just as much a deprivation of due process to refuse to permit a landowner to offer evidence and to direct the jury as to the amount of the verdict to be brought in as it is to refuse a trial by jury completely. A trial which gives the trier of fact no duties to perform is a sham, a mockery. It is no trial at all in the purview of constitutional guaranties and this trial was all the more ludicrous because even under the view of the Illinois Supreme Court and the defense there was an actual conflict in the testimony as to the shrinkage in value of the surface, such figures ranging on the testimony actually presented in court from $4,000 to $16,000. The trial court, even if it had a right to substitute itself for the jury on the question of the value of the thing taken, surely had an obligation to submit the conflicting evidence to the jury on the damages to the thing not taken.

This conflict in evidence was brought out in the appeal to the Illinois Supreme Court—at page 296 of the Abstract of Record in the testimony of William L. Syrcle for the defendants out of the presence of the jury:

> "Q. You did mention one item of damage. In your opinion would that element of damage be apart from the taking of the easement?
>
> "A. Again I will say a conservative appraiser would consider that the average buyer would of course put more weight on the damage about Herscher. My

personal question is that the Herscher field has been damaged to the extent of probably 25 per cent of the value before the field was started. My opinion is that this land will be damaged to the extent of roughly 20 per cent of $100 per acre.

"Q. That is in addition to the——

"A. In addition to the value of the easements taken."

and petitioners' evidence was (Abstract of Record, page 233):

"The Buckles land is worth $25.00 an acre less as a result of the existence of the easement as to gas storage."

and the trial court in effect said that it had no duty to submit a conflict in the evidence to the jury. The Supreme Court of Illinois was advised of this conflict in the evidence at page 89 of the Statement, Brief and Argument for Appellants:

"In this case the court usurped the function of the jury by the rather simple expedient of excluding all evidence contrary to the court's theory of the case. The court's theory seemed to be that the St. Peter sandstone had no value and that therefore its use by the petitioner was simply a burden rather than the expropriation of a natural resource. Having arrived at this decision then the only admissible evidence in the mind of the court was as to the dollar value of that burden. Even on this point the court was not entirely consistent since the petitioner's witnesses testified that the damage to the land for farm purposes was $25.00 per acre but one of the respondents' witnesses in giving his testimony of value included the statement that the damage to the surface was $100 per acre (A. 297) or $16,000.00, in addition to the value of the easement taken."

The Court, in addition to being unwilling to submit a conflict in evidence to the jury, refused all evidence as to the value of the easement rights taken and went so far as to accept testimony from appraisal witnesses offered by the petitioner not one of whom had any knowledge in regard to the gas storage easement rights or as to the contemplated use by the plaintiff of the easement rights which it sought. While admitting evidence of plaintiff's witnesses, whose lack of qualification is shown at pages 233 and 234 of the Abstract of Record in questions and answers out of the presence of the jury:

> "Q. Whether or not the gas storage inherently has any valuation in the easement you are not prepared to say?
>
> "A. Right."
>
> "Q. Then you are not attempting to put any value on the St. Peter sandstone under this at all. Is that correct?
>
> A. That is correct."

and at page 244:

> "Q. Do you know or did you know at the time you appraised this land what was below the surface of this land?
>
> "A. No."

the court denied the evidence offered by defendants' witnesses as to the value of the easement rights actually taken although defendants' evidence included testimony (Abstract of Record, pages 275 and 302) by men who were experts in making reservoir studies and who were petroleum engineers qualified for appraisal work of this type, and also denied the testimony of an appraisal witness of the defendants (Abstract of Record, page 290) who had qualified himself by becoming acquainted with gas storage projects in the State of Illinois and with comparable sales in other states of gas storage easement rights and with

the cost of substitute facilities. The court in effect accepted the testimony of men who had no idea of the value of the real estate burdened by the easement because they did not know the nature of the easement rights taken nor the use to which those easement rights would be put.

The court is saying that: "I do not have to listen to the evidence of the landowners. I only have to listen to the evidence of the plaintiff" in almost an exact paraphrase of the Justice of the Peace who would listen to only one side of the case because when he heard both sides he became confused. To say that this is due process is to endorse the attitude of some of the early Judges in this country who said: "We'll give you a fair and square jury trial, and then hang you."

The defendants had not exploited the natural resources of this storage dome that was under their land and it may well have been that they would never have exploited it but that does not mean that the land value does not reflect this resource. If a farmer has coal under his land, it is unlikely that he alone will be able to realize an economic gain from its mining but the fact remains that the value of the land reflects the value of the coal deposits. In this case an expert appraisal engineer testified (Abstract of Record, page 281) that the fair market value of the defendants' property before the taking was $291,000 ($1,818.00 per acre) and the fair cash market value after the taking was $88,000 ($550.00 per acre), which testimony was supported by the testimony of another reservoir engineer and other appraisers with a general appraisal background. The plaintiff had no evidence of any type as to the value of the thing taken.

The problem of the valuation of underground reservoirs was considered in a line of cases beginning with **Montana Ry. v. Warren** (1890), 137 U. S. 348, 352, 353, when the Supreme Court affirmed the Montana Court, saying:

"The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. . . . That this mining claim, which may be called only a prospect', had a value fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subjects of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation; it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospect' has a market value; and the absence of certainty is not a matter of which the . . . (condemnor) can take advantage, when it seeks to enforce a sale . . ."

and other cases reversing trial courts for rejecting alleged mineral values even though the presence or amount of minerals was conjectural and the ultimate recoverable mineral value entirely speculative include **Cal-Bay Corp. v. U. S.**, 169 F. 2d 15, **cert. denied** 335 U. S. 859 (1948); and **Eagle Lake Improvement Co., et al. v. U. S.** (1944), 141 F. 2d 562; and **Phillips v. U. S.** (1957), 243 F. 2d 1.

As a result of our case thousands of landowners throughout the United States are being told by the men acquiring gas storage easements for the gas companies that: "If we want your gas storage easement rights, we'll take them and the only thing that you are entitled to is the damage to your surface use. You are not entitled to any compensation for the easement rights which we are taking." By failing to allow oral argument and by failing to deliver a written opinion, this Court has, in effect, granted to the gas companies as to states which permit the use of the power of eminent domain to acquire underground gas storage easements all of the subsurface gas storage rights at no cost except for damages to property not taken.

CONCLUSION.

The petitioners respectfully pray that this appeal be reinstated or that treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari be granted; and that this Court take jurisdiction on the record in this case and the appellants be permitted to file briefs upon the merits and be permitted to make oral argument thereof, and that this Court declare the Illinois gas storage act repugnant to the Federal Constitution or order that this case be retried with the direction that evidence be received as to the value of the real estate taken in fixing the compensation due the appellants.

Respectfully submitted.

By .....

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I do hereby certify that this petition is presented in good faith and not for delay, and this petition is restricted to substantial grounds available to the petitioners although not previously presented.

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Stanley B. Balbach